STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2003
v	No. 235189 Calhoun Circuit Court
CHARLES NICHOLAS CLEMONS, Defendant-Appellant.	LC No. 01-000071-FC

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals from his conviction of armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157a, bank robbery, MCL 750.531, and conspiracy to commit bank robbery, MCL 750.157a, resisting and obstructing a police officer, MCL 750.479(b), and third-degree fleeing and eluding a police officer, MCL 750.479(a)(3). We affirm in part, and vacate in part.

I. Double Jeopardy

Defendant argues that his convictions for armed robbery and conspiracy to commit armed robbery, as well as bank robbery and conspiracy to commit bank robbery violated his double jeopardy protection against multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15. The prosecutor concedes the error, and we agree.

This Court reviews double jeopardy challenges de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). As noted, defendant was convicted of armed robbery and conspiracy to commit armed robbery, as well as bank robbery and conspiracy to commit bank robbery. As in *People v Campbell*, 165 Mich App 1, 3-4; 418 NW2d 404 (1987), defendant's convictions arose out of the same offense – one armed robbery of the bank tellers. Where two statutes (armed robbery/conspiracy to commit armed robbery, and bank robbery/conspiracy to commit bank robbery) prohibit violations of the same social norm (assaultive conduct), albeit in a somewhat different manner, "as a general principle it can be concluded that the Legislature did not intend multiple punishments." *People v Robideau*, 419 Mich 458, 487; 355 NW2d 592 (1984). Here, it cannot be said that the Legislature intended defendant to be punished under both the armed robbery and bank robbery statutes.

This Court has held that "the remedy in situations where a defendant has been erroneously convicted under two separate statutes for a single offense is to affirm the conviction on the higher charge and vacate the conviction on the lower charge." *Campbell, supra* at 7. Therefore, we affirm defendant's convictions for armed robbery and conspiracy to commit armed robbery, and vacate defendant's convictions for bank robbery and conspiracy to commit bank robbery.

II. Identification

Defendant also contends that a witness' identification of defendant at the preliminary examination was impermissibly suggestive. We disagree. We review de novo the trial court's ultimate decision with regard to a motion to suppress evidence. *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998). However, we review the trial court's findings of fact in deciding the motion for clear error. *Id.* A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made. *Id.*

This Court has held that "an identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). As the *Williams* Court further explained:

> In order to challenge an identification on the basis of lack of due process, "a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." If the trial court finds the procedure was impermissibly suggestive, evidence concerning identification is inadmissible at trial unless an independent basis for in-court identification can be established 'that is untainted by the suggestive pretrial procedure.'" [*Id.* at 542-543. (citations omitted).]

"The court must consider all relevant facts concerning the preliminary examination identification to determine if it violated due process." *Solomon, supra*, 218-219. Particularly important factors include (1) the length of time between the offense and the confrontation, and (2) the length of the time the witness had to view the defendant. *Id.*, 219. However, "the rule . . . is narrow," and "does not establish the principle that all confrontations at preliminary examinations are impermissibly suggestive." *People v Johnson*, 58 Mich App 347, 353; 227 NW2d 337 (1975).

Here, defendant concedes that the length of time between the robbery and the preliminary examination was only twelve days. However, defendant argues that the amount of time the witness had to view defendant's face before the robbery (approximately five seconds), should be given more weight than the length of time between the robbery and the in-court identification.

The trial court determined that the process used for identification at the preliminary examination was not impermissibly suggestive. The trial court noted that although the witness' encounter with the codefendants was only about five seconds, it was a face-to-face encounter with sufficient lighting. The trial court focused on the fact that the witness was attentive, and

was not in a state of mind that would adversely affect her memory. Further, the trial court found the witness' confidence in her ability to identify the men to be important, and that her identification of the men was not the result of seeing them wearing orange jumpsuits in the courtroom. The trial court's determination was not clearly erroneous, because viewing the totality of the circumstances, the witness' identification was reliable, and we are not left with a definite and firm conviction that a mistake has been made.

Affirmed in part, vacated in part.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder